MEMORANDUM

TO: Members, Clark Fork Basin Water Management Task Force
FROM: Matt McKinney and Gerald Mueller, Project Coordinators, and Maureen Hartmann, Project Associate
SUBJECT: Summary of the December 1, 2003 Meeting
DATE: December 18, 2003

Participants

The following people participated in the Task Force meeting:

Task Force Members:

Eugene Manley	Granite County
Harvey Hackett	Bitterroot Water Forum
Bill Slack	Flathead Irrigation District
Matt Clifford	Clark Fork Coalition
Jim Dinsmore	Upper Clark Fork River Basin Steering Committee
Holly Franz	PPL Montana
Steve Fry	Avista Corp
Jay Stuckey	Lower Clark Fork
J. Gail Patton	Sanders County
Marc M. Spratt	Flathead Conservation District
Verdell Jackson	Legislature

Staff:

Matt McKinney	Montana Consensus Council (MCC)
Gerald Mueller	MCC
Mike McLane	Montana Department of Natural Resources and Conservation (DNRC)
Maureen Hartmann	MCC

Meeting Goals:

$ Discuss hydropower water rights, junior rights and future water development
$ Review Chapter 7 of the water management plan
$ Review Chapter 9 of the water management plan
$ Discuss DNRC water rights enforcement policy and activities
$ Discuss public outreach and newsletter
$ Discuss work plan

Chapter 2 Discussion: Irrigated Acres

Mike McLane passed out a memorandum discussing different methods of calculating the number of irrigated acres for Chapter 2 of the Draft Management Plan. Mr. McLane argued that the total acres reported in Chapter 2 by the Task Force consultant which was calculated from the GAP data set is too low when compared to results from the other five available data sources.

Task Force Action - The Task Force asked its technical subgroup including Mr. McLane, Marc Spratt and Matt McKinney to discuss this issue and make a recommendation regarding it at the next Task Force meeting.

Marc Spratt requested that the Task Force write a letter to Senator Burns in support of federal funding for an aerial data collection aimed at creating an accurate map of Flathead vegetation focused on water use.

Task Force Action - The Task Force requested that Mr. Spratt supply a written explanation of and justification for the grant request to the Task Force prior to its meeting in January.

Discussion of a Hydropower Water Rights, Junior Water Rights, and Future Water Development

Gerald Mueller restarted the discussion began at the November Task Force meeting of the 1999 agreement between the State of Montana and Avista regarding Avista's water rights at its Noxon Rapids Dam, the security of basin water rights junior to Avista's, and future water development in the basin. Steve Fry pointed out that although the November meeting summary stated that the agreement was not ratified, it was signed by Governor Racicot and a representative of Avista. The long-term agreement that was supposed to follow from the State-Avista agreement was not developed because FERC declined to include the 1999 agreement as a condition of Avista's Noxon Rapids FERC license. The Task Force members asked and discussed the following questions:

$ <u>What is the problem a long-term agreement with Avista would solve?</u>
The Task Force generally agreed that the problem that might be addressed has two aspects, the security of water rights junior to Avista's rights and future water development in the Clark Fork basin. These two are addressed by the next two questions.

$ <u>How secure are water rights junior to Avista's?</u>
The security is affected by Avista's ability to make a call on junior rights holders. A Task Force member pointed out that Avista would have to show that a call would not be futile, i.e. that a call could be managed to result in additional water reaching its turbines. Another stated that Avista would be likely to target a few large junior water rights such as storage dams rather than many small rights. Another member stated that Avista may not have the ability to make a call so long as the adjudication remains unfinished.

$ <u>Is there any undeveloped water?</u>
A Task Force member stated that a perception held in the Flathead basin is that water availability is not limited now. Another stated that growth in water use in the Flathead is related mostly to urban rather than agricultural uses. Urban uses tend to depend on ground water rather than surface water, and neither the extent of the ground water resource nor the connection between surface and ground water is understood. Thus, additional water is probably available for additional development but how much is not known.

$ <u>Do Avista's water rights effectively preclude future water development?</u>
Some argue that the fact that Avista's rights are not filled except for a few days in three years out of ten means that no more surface water is available to support future development. Another pointed out that DNRC continues to issue new surface water right permits, and Avista is not objecting to them. Avista argues that it is the state's responsibility to protect existing water rights from new permits. Another commented that DNRC permitting takes a local, stream reach rather than basin-wide perspective, which means that notification of pending permits is limited to the immediate reach, and that cumulative effects are not addressed adequately. Another view offered was that the impact of new water rights in the Flathead on Avista's rights is likely to be negligible.

The discussion then turned towards what a long-term agreement might contain. Options discussed included:

$ A basin closure to new surface or new surface and ground water rights.
A closure would address future water development but not the security of existing junior rights. A closure might be temporary and could be lifted in a subbasin after it has developed a water management plan that, for example, provides for managing and sharing water shortages. One view expressed is that a closure amounts to extortion. Another stated that Avista might be more willing now to negotiate an agreement that would include a surface water closure that would preclude the necessity of making a call on junior users rather than after the adjudication is completed and its ability to make a call is strengthened.

$ Drought planning by subbasins.
Subbasins would develop local drought plans that would share the water shortage, perhaps according to predetermined subbasin outflow targets.

$ A problem solving process/structure.
An agreement could be couched in terms of problem solving and would not specify specific outcomes. For example, applicants for new permits might be required to consult with senior water rights holders.

The Task Force agreed to continue this discussion at the next meeting.

Review of the Chapter 7 of the Water Management Plan

Gerald Mueller led a discussion of the November 23, 2003 draft of chapter 7, Options to Protect the Security of Water Rights. Task Force Participants commented on the language in the chapter and agreed on changes. The discussion focused on the language under the heading "Relieving the Burden on Existing Water Rights Holders" which was drafted to capture the discussion at the November Task Force meeting. The specific suggestions are reflected in the December 18, 2003 draft of the chapter which is attached in Appendix 1 below.

Review of the Chapter 9 of the Water Management Plan

Gerald Mueller led the Task Force in a discussion of the latest draft of Chapter 9. The participants reviewed the draft document and made changes to the language agreed to by all members. The changes are reflected in the December 9, 2003 draft of the chapter which is attached in Appendix 2 below.

Discuss Public Outreach and Work Plan

The previous Task Force work plan and schedule called for meetings during through February 2004 followed by issuance of a newsletter with proposed plan recommendations and conduct public outreach including public forums, interest group meetings, etc., in March 2004.

Task Force Action - The Task Force agreed to alter its work plan and schedule. Instead of issuing a newsletter in March, Task Force staff will prepare a short summary of the options identified as of then for the management plan. Task Force members will share this summary with their constituent groups plus other key interests. The remainder of the schedule is as follows:

April - June 2004	Task Force meetings to consider feedback received and prepare a draft document.

July 2004	DNRC will convene a formal State Water Plan public hearing on the draft management plan during July.
August 2004	The Task Force will finalize the plan and its recommendations and send it to the printer.
Sept. 15, 2004	Distribute report to the legislature, governor & others.

The Task Force also agreed to brainstorm potential opponents to plan recommendations at a future meeting.

Next Meeting

The next meeting was scheduled for Monday, January 5, 2004 at 9:00 a.m. in the DFWP conference room at 3201 Spurgin Road in Missoula. The agenda will include:

- A presentation about sub-basin planning funded through the Bonneville Power Administration pursuant to the Northwest Power and Conservation Council fish and wildlife program;
- Continued discussion of a hydropower water rights, junior water rights, and future water development; and
- Review of the draft of plan chapter 7 and 9.

Appendix 1
Chapter 7
Options to Protect the Security of Water Rights
Draft of December 18, 2003

This chapter identifies options to protect the security of water rights, the first of the three specific tasks set out for the management plan in HB 397. To understand why water right security is important, one must understand the utility of a water right and what would constitute security. Before identifying the options, the existing means for providing protection are discussed.

What Do Secure Water Rights Protect?

As explained in Chapter 3, a water right conveys not the ownership of water but the right to put water to a beneficial use. Thus, secure water rights ensure the ability to use water when it is legally and physically available. Legal availability refers to the "first in time, first in right" rule. Because water is a limited resource, water rights determine how it is to be allocated among competing users. By determining water use, a secure water right also protects the economic interest dependent on the use of water.

What Is Meant by Security of Water Rights?

Security in a water rights context means that the allocation rules are not changing and that their application is both predictable and certain. Security also means that enforcement of water rights is timely and affordable, and that new uses of water should not impact existing uses.

What is Presently Being Done to Protect the Security of Water Rights?

The security of water rights is now addressed through legal and planning processes.

Legal Processes - Since 1979, the Montana Water Court has been conducting a state-wide water rights adjudication to quantify all pre-1973 water rights and clarify their priority dates. As a part of this process, the Montana Reserved Water Rights Compact Commission (Compact Commission) has been negotiating compacts with agencies of the federal government to quantify reserved federal water rights. In the Clark Fork River Basin, the Compact Commission is negotiating compacts with the Confederated Salish and Kootenai Tribes and the United States Forest Service. Beginning in 1973, new water rights are secured through the water rights permitting and change processes administered by the Montana Department of Natural Resources and Conservation (DNRC) pursuant to the Montana Water Use Act. Water rights holders on streams that have an enforceable decree issued by state or federal courts or through the state-wide adjudication can enforce their rights by hiring a water commissioner to implement the decree. Some basins have been closed to the issuances of new surface water rights either through administrative rule, legislative action, or a negotiated compact. Basin closures protect existing water right holders by prohibiting new junior water uses, thereby eliminating the need to spend time and money objecting to proposed new permit applications on streams which are already over appropriated. Individual water rights holders can also seek to protect their rights through litigation in Montana courts. In the case of water right permits issued by DNRC after 1973, an

individual can seek enforcement by DNRC. As discussed in Chapter 4, DNRC will first seek voluntary compliance, but can then request that the court impose a fine for each day that a water rights permit violation exists.

Planning Processes - In addition to legal processes, Clark Fork River Basin water rights holders and water interests are working together in collaborative watershed planning groups and through other organizations such as associations, irrigation districts. These groups engage in activities such as water data collection, maintenance and construction of water storage and conveyance facilities, drought planning, water quality improvement and riparian area restoration projects, dispute resolution, and water education.

New Options to Protect the Security of Water Rights

Complete the Water Rights Adjudication - The most important option is to complete the adjudication of water rights in the Basin. Until the adjudication is completed no water right will be secure. Allocation of water within the basin cannot be enforced until the quantity and priority of all Basin water rights is determined. Given the lack of any completion goals and the inadequate staffing and funding resources now provided to two agencies carrying out it out, the Water Court and the DNRC, no one has any idea when the adjudication may be finished. The 1979 legislation which set the adjudication in motion was accompanied by a fiscal note indicating that 100 full time equivalents (FTE's) would be required to conduct the work. However, the Montana Water Court now has only six water masters and three administrative support positions in addition to the chief water judge. The DNRC has only 9.8 FTEs assigned to assisting the Water Court deliberations. Completing the adjudication will be facilitated by the following actions.

$ Establish specific dates as goals for completing key steps in the process, including:
  - N 4 years to complete the DNRC claims examination;
  - N 2 additional years to complete Water Court issuance of preliminary decrees; and
  - N 4 additional years for the Water Court to issue enforceable decrees throughout the Basin.

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$ Provide additional resources for the adjudication process, including:
  - ° Additional funding for the Water Court and the DNRC; and
  - ° Re-prioritize DNRC's existing resources to focus on the adjudication

Resolve the Status of the Salish and Kootenai Tribal Water Rights - The adjudication cannot be completed until the status of the Tribes' water rights is definitively resolved. The state and the Salish and Kootenai Tribes should move as rapidly as possible to resolve the status through negotiation or litigation.

Improve the Accuracy of the Water Rights Adjudication - Under the existing adjudication process, final decrees may not resolve inaccurate water rights claims. Accuracy is important because inaccurate decrees may deny water to individual water rights holders to which they are legally entitled and because the federal statute which subjects federal water rights, including federal reserved rights, to state adjudication processes, requires that the adjudication be "sufficiently accurate." Presently, the Water Court examines the accuracy of water rights claims only if individual rights holders file objections to them in the Court process. If no one objects, bogus claims would be included in final decrees. Although it has ruled that it has the authority to examine claims itself, the Court is not doing so. This problem could be alleviated in one of two ways. First, the Court could examine claims and resolve those it finds to be inaccurate. Second, an institutional objector such as the DNRC

or the Montana Attorney General could be empowered and funded to examine claims and to object to those found to be inaccurate. Adequate funding would be necessary because of the number and complexity of the claims which must be examined. Given the time and money which has been and continues to be devoted to the adjudication, all reasonable efforts should be made to ensure that the adjudication results in durable and accurate water rights.

Relieving the Burden on Existing Water Rights Holders - Water rights holders must initiate and fund legal actions in administrative proceedings and the courts to enforce their water rights. These actions are sufficiently time consuming and expensive to discourage enforcement. Also, because of a combination of factors including the lack of resources, the requirement that it obtain a court order to do so, and an apparent lack of willingness to do so, DNRC rarely exercises its existing enforcement authority on behalf of individual water rights holders. Alternative actions that would lower the enforcement burden on individual water rights holders include:

$ Provide more resources so that DNRC can use its existing authority to verify water rights;
$ Provide more resources so that DNRC can use its existing authority to enforce water rights;
$ Change Montana law to allow a judge to award attorney fees to a private party bringing an action for an illegal use of water;
$ Empower DNRC to investigate and regulate water use in basins without an enforceable decree at least until a final decree is issued;
$ Empower DNRC to issue fines for violations of the Montana Water Use Act using authority similar to that exercised by the Montana Department of Environmental Quality in enforcing air and water quality standards;
$ Require DNRC to appoint water commissioners to enforce decrees;
$ Require all water rights holders under a decree to divide the water commissioner costs according to the percentage share of the total water rights;
$ Authorize DNRC staff to serve as a court appointed water master.
$ Utilize court appointed or DNRC mediators to resolve enforcement issues; and
$ Require DNRC to initiate administrative rule making to establish criteria for objecting to water rights permit and change applications that increase the burden on applicants while reducing the burden on existing rights holders.
$ Change Montana law to prevent a violator of the Montana Water Use Act from getting a water permit for some period of time;
$ Institute surface and/or ground water rights basin closures; and
$ Condition new DNRC permits to require measurement of flow and volume of water diversions.

Applying New Technology - Application of geographical information systems and increasing coordination among data collectors and examiners would improve water regulatory and planning activities.

Assess Ground Water and Aquifer Characteristics - Ground water is becoming a more important water resource. EPA regulations encourage ground water to be used as the source of municipal water supplies. Unfortunately, the Basin's ground water resources are not well known. Additional study is needed to determine ground water use, recharge rates, and aquifer capacity.

Appendix 2
Chapter 9
Options for Conserving Water
Draft of December 9, 2003

This chapter identifies options for conserving water in the future, the third of the specific tasks set out for the management plan in HB 397. This chapter begins with a definition of conservation, continues by describing existing activities in the basin that promote conservation, and then sets out additional options for conserving water in the future.

What Does Conserving Water Mean?

To some, conservation has the connotation of saving rather than using. In this plan, conservation means the *long-term, sustainable use* of water resources. Water can be used beneficially through a diversion and instream. Water can be conserved by preserving the qualities that maintain instream uses as well as those that allow long-term sustained use for diversionary uses such as irrigation, stock watering, etc.

What is Presently Being Done to Promote Water Conservation in the Basin?

Current activities for water conservation in the basin may be identified in terms of one of three categories: administrative, management, or education and research.

Administrative

The DNRC takes administrative actions that promote long-term, sustainable water use by regulating water use through Montana's system of water rights. The rights, which can now be bought and sold and leased, create the legal framework protecting individual water uses. Water rights also include use efficiency standards/guidelines designed to prevent waste such as the one inch per acre water duty which limits how much water can be used legally when irrigating and the ten year period after which a water right may be declared abandoned for non-use.

Management

Agencies, organizations, and individuals also conserve water through management activities. Individuals and water user organizations conserve water by experienced-based management activities such as timing irrigation, measuring water diversions, and maintaining headgates and irrigation ditches. Agencies and non-governmental organizations such as the Natural Resource Conservation Service (NRCS), Montana Rural Water Systems, Inc., the DNRC , conservation districts, and water quality districts, provide funding and technical assistance to assist public and private water managers.

Some management activities designed to increase the "efficiency" of water use may, however, be counterproductive because they decrease water availability later in the year or

for other water users or because they increase water consumption. Activities that may be counterproductive include converting flood irrigation to sprinkler which can significantly reduce return flows to surface water, and using water salvage to increase crop production, thereby increasing water consumption through increased evapotranspiration and evaporation.

Particularly significant conservation management activities occur during periods of drought. In some areas, drought is now managed by managing water rights. In sub-basins with an enforceable water rights decree water rights holders can opt to petition district court for the appointment of a water commissioner who then allocates water pursuant to the decree (see Chapter 4). The Flint Creek Valley is an example of this approach. In other sub-basins, droughts are managed through development and implementation of voluntary drought plans. The Big Hole, Jefferson, and Blackfoot river basins use such plans. While each plan is unique, the three share several characteristics. The three plans:

- Were developed voluntarily, but were motivated by some combination of the following factors:
  - A perceived threat such as an Endangered Species Act listing (grayling in the Big Hole and bulltrout in the Blackfoot), a requirement to measure all irrigation diversions, etc.;
  - Economics;
  - A sense of community, i.e. we are in this together;
  - The desire to preserve the quality of life; and
  - Individual personalities and social pressure;
- Were designed to meet fishery or instream flow objectives;
- Were based on trigger flows;
- Are locally implemented;
- Share shortages with sportsmen and sportswomen through fishing closures;
- Contain long-term water conservation measures such as ditch lining, wells for stock watering, and water trading; and
- Are funded through grants and donated services from agencies and individuals. (The Blackfoot plan annual costs are $8-10,000).

Education and Research

Several entities now provide water conservation educational materials and activities: NRCS, DNRC, conservation districts, water quality districts, the county extension program, Montana Rural Water Systems, Inc., and public and private water companies. The Montana Watercourse has available school curricula addressing water conservation. The Montana Bureau of Mines and Geology is conducting research to characterize the ground water resource throughout the state including the Clark Fork Basin.

Future Alternative Activities for Conservation of Water

Future alternatives for conserving water, i.e. providing for long-term, sustainable water use, can also be categorized in terms of administration, management and education and research.

Administration

- $ Improve DNRC's system for handling and managing water data to make it more accessible to the public.
- $ Develop incentives for efficient use.
- $ Require measurement of water use for new water permits and change authorizations.
- $ Hold the United States Forest Service forest management accountable for water yield.
- $ Set target flows in the State Water Plan for water discharge from each of the major watersheds in the basin.
- $ Encourage creation of smaller subbasin planning entities.
- $ Adopt local government model water conservation ordinances.
- $ Encourage counties to require water meters in new subdivisions.
- $ Encourage local government-owned water systems to require water meters.
- $ Create water quality districts.
- $ Coordinate DNRC and DEQ well requirements to ensure cumulative effects analysis (DEQ requires pump test resulting in 1.5 times design flow rate; DNRC requires pump test showing design flow rate).
- $ Provide legal protection for ground water provided by irrigation.
- $ Provide legal protection for areas in which surface waters recharge ground water.

Management

- $ Measure water uses and diversions.
- $ Limit diversions to only what is needed for the beneficial use.
- $ Store available, unneeded water.
- $ Manage ground water provided by irrigation.
- $ Improve water conveyance efficiency.
- $ Develop basin water management and drought plans.
- $ Identify, manage and protect areas in which surface waters recharge ground water.
- $ Participate in the Source Water Protection Program.
- $ Manage the supply side, e.g. use artificial recharge.

Education and Research

- $ Continue existing water conservation programs.
- $ Provide education about activities that might affect ground water recharge and quality.
- $ Emphasize that wasting water also wastes electricity.

- $ Research the connection between ground water infiltration and base stream flow.
- $ Determine ways to conserve water and quantify the potential volumes.
- $ Research the connection between the basin vegetation and base flow.
- $ Determine the seven day average low flow in a ten year period which is sometimes known as 7Q10.
- $ Provide for long-term, coordinated education for water users.